



**Council of Governors & another v Attorney General & 5 others
(Constitutional Petition E279 of 2020) [2023] KEHC 26435 (KLR)
(Constitutional and Human Rights) (15 December 2023) (Judgment)**

Neutral citation: [2023] KEHC 26435 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
CONSTITUTIONAL PETITION E279 OF 2020**

AC MRIMA, J

DECEMBER 15, 2023

BETWEEN

COUNCIL OF GOVERNORS 1ST PETITIONER

COUNTY GOVERNMENT OF LAIKIPIA 2ND PETITIONER

AND

THE ATTORNEY GENERAL 1ST RESPONDENT

THE SPEAKER OF THE SENATE 2ND RESPONDENT

THE SENATE 3RD RESPONDENT

CONTROLLER OF BUDGET 4TH RESPONDENT

THE NATIONAL TREASURY 5TH RESPONDENT

**THE CABINET SECRETARY, MINISTRY OF FINANCE & NATIONAL
PLANNING 6TH RESPONDENT**

JUDGMENT

Background:

1. The dispute, subject of this Petition, emanates from the delay occasioned by The Senate, the 3rd Respondent herein, in passing the County Allocation of Revenue Act, 2020.
2. In his statement of 3rd September 2020, the then Chairman of the Council of Governors, Hon. Wycliff Oparanya, expressed concern that the delay by the Senate to pass the County Allocation of Revenue Act had resulted in a sudden halt of County Government operations including, the non-payment of salaries and provision of critical and essential services.



3. The Statement further indicated that effective 17th September 2020, services would not be available in the counties and the employees would have to proceed on leave until an amicable solution is reached.
4. The Council of Governors and the County Government of Laikipia, the 1st and 2nd Petitioners herein, in seeking to assert the need by the Senate to expeditiously pass Revenue Bills instituted the instant Petition.
5. The Respondents challenged the Petition.

The Petition:

6. Through the Petition dated 11th September 2020, supported by the Affidavit of Jacqueline Mogeni, the then Chief Executive Officer of the Council of Governors, deposed to on 14th September 2020, the Petitioners sought to claim various constitutional entitlements infringed by the Respondents with respect to revenue due to County Governments.
7. The Petitioners pleaded that the Senate had failed to determine the basis of revenue allocation among Counties, an obligation constitutionally decreed under Article 217 to take place once every five years.
8. It was the Petitioners' case that the failure by the Speaker of the Senate and the Senate, being the 2nd and 3rd Respondents respectively, had affected the enactment of the County Allocation of Revenue Acts as envisioned under Articles 218(1)(b) and 219 of the Constitution which required transfer of revenue to the County Government without undue delay.
9. The Petitioners averred that consequently, counties had been unable to pass their respective County Appropriation Bills thus greatly impeding their ability to carry out their constitutional functions.
10. In a bid to demonstrate the extent of the Senate's fault, the Petitioners referred to the Supreme Court decision in Council of Governors & 47 Others -vs- Attorney General & 3 Others (Interested Parties) Katiba Institute & 2 Others (Amicus Curiae) (2020) eKLR where the Court observed that the life of Parliament may be discontinued due to failure to enact legislation within a specific time.
11. The Petitioners posited that the Apex Court Judges reiterated the importance of enacting legislation within set timelines since they operationalize the financial existence of the Country and, without that, there would be no Legislature, Judiciary or County Governments.
12. The Petitioners averred that according to the Learned Judges of the Supreme Court, failure by Parliament to discharge such a critical legislative function exposes the country to existential danger and in such cases, the High Court retains residual jurisdiction which may be activated under Article 261 to ensure that the specified law is enacted.
13. It was the Petitioner's case that under Article 217(7) of the Constitution, the allocation of revenue would have been pegged on the current second-generation revenue formula pending approval of the third-generation formula in order to ensure that County Governments do continue functioning.
14. It was the Petitioner's case that the Attorney General's legal opinion to The National Treasury and The Cabinet Secretary, Ministry of Finance & National Planning, the 5th and 6th Respondents herein respectively, of 19th August 2020 was contrary to the Supreme Court Advisory Opinion in Council of Governors & 47 Others -vs- Attorney General & 3 Others (Interested Parties) Katiba Institute & 2 Others (Amicus Curiae) (*supra*).



15. The Petitioner averred that The Controller of Budget, 4th Respondent herein, was joined to the proceedings by virtue of Article 206(4) of the *Constitution* which provides that money shall not be withdrawn from the Consolidated Fund unless approved by the Controller of Budget.
16. The Petitioner claimed that the inaction by the 3rd Respondent and the failure by the 4th, 5th and 6th Respondents to release the 50% of the monies due and owing to the Petitioners gravely aggrieved them.
17. On the foregoing legal and factual backdrop, the Petitioners prayed for the following reliefs: -
 - a. A declaration that the delay in passing the County Allocation of Revenue Act by the Senate subverts the *Constitution* and impedes the functioning of County Governments.
 - b. A declaration that if the County Allocation of Revenue Act has not been passed by the beginning of a financial year, County Governments are entitled to receive up to 50% of the last County Allocation of Revenue Act approved by Parliament for purposes of meeting expenditures of the County Governments for the financial year in accord with the Supreme Court Advisory Opinion No. 3 of 2019 dated 15th May 2020.
 - c. A declaration that if the County Allocation of Revenue Act has not been passed by the beginning of a financial year the 4th Respondent is under duty to authorize withdrawals by County Governments of up to 50% of the last County Allocation of Revenue Act approved by Parliament for purposes of meeting expenditures of the County government for the financial year in accord with the Supreme Court Advisory Opinion No. 3 of 2019 dated May 2020.
 - d. A declaration that the 1st Respondent is bound by the Supreme Court Opinion No.3 of 2019 dated 15th May 2020 and any Opinion and advice to the 4th and 5th and 6th Respondents contrary to the opinion is violative of Article 156(6) of the *Constitution* and therefore null and void.
 - e. Spent
 - f. Or such other orders as this Honourable Court shall deem just.
 - g. That there be no Orders as to costs.

The Submissions:

18. The Petitioners urged their case further through written submissions dated 15th November 2021.
19. On the issue as to whether County Governments are entitled to 50% of the last County Allocation of Revenue pending the passing of Revenue Allocation law for the subsequent year, it was their case that Regulation 134 of *Public Finance Management (National Government) Regulations, 2015* allows the Controller of Budget to authorize withdrawals of up to 50% from the Consolidated Fund based on the last County Allocation Revenue Act approved by Parliament.
20. The Petitioner submitted that the Regulation was in keeping with the Supreme Court decision in *Council of Governors & 47 Others -vs- Attorney General & 3 Others (Interested Parties) Katiba Institute & 2 Others (Amicus Curiae)* (2020) eKLR where it was observed: -

... in my view the answer is to be found within the existing laws. Article 203(2) of the *Constitution* guarantees County Governments an equitable allocation of a minimum 15% of all national revenue collected by the National Government. As such, this amount ought



to be readily available to the County Governments as it is already allocated under the *Constitution* and is readily ascertainable.

21. As regards the constitutional mandate of the Controller of Budget, the Petitioner submitted that a holistic reading of Articles 203(1)(c) (k), 206(2) (4), 248(3) alongside Regulation 134 of the *Public Finance Management (National Government) Regulations, 2015*, access to funds due to Counties should not be subject to approval by National Assembly.
22. The Petitioner further submitted that funds due to Counties ought to be disbursed without unreasonable delay and as soon as the action arises. It was their case that as per Article 219 of *the Constitution* the equitable share of revenue for County Government ought to be release within 14 days.
23. To that end, the Petitioners drew support from the 5-Judge bench decision in *Law Society of Kenya - vs- Attorney General & 2 Others* where it was observed: -

... when it comes to matters of national interest, the thread that runs across the Constitutional timelines with respect to purely procedural matters where what is required is more or less a seal of approval or formalization of a decision already substantially made, then fourteen days period is generally reasonable.
24. Pursuant to the foregoing, the Petitioners submitted that the fourteen days' timeline begins to run immediately after the President assents to the Division of Revenue Act.
25. In the end, the Petitioners submitted that the Petition is merited and ought to be allowed as prayed.

The 1st Respondent's case:

26. Whereas the Attorney General claimed to have filed a Replying Affidavit, as indicated by its reference in the written submissions dated 31st January 2022, the said Affidavit is neither in the physical file nor in the e-filing platform.
27. However, in view of the fact that the 1st Respondent's case aligned with that of the 2nd, 3rd and 4th Respondents, this Court shall consider the written submissions, the Replying Affidavit's absence notwithstanding.
28. In the said submissions, the 1st Respondent contended that its advisory opinion, which was requested by the Cabinet Secretary, Finance and National Planning, the 6th Respondent herein, was on whether it can use the Supreme Court Advisory Opinion to release funds to the County Government without the approval of the National Assembly.
29. To that end, the 1st Respondent submitted that the Advisory Opinion was concerned with the circumstance where there was an impasse around the passage of the Division of Revenue Bill which was not the case in the instant dispute.
30. It was the 1st Respondent's case that the Petitioners were instead before the Court on the impasse around enactment of the County Allocation of Revenue Act which had long been solved.
31. It further was its case that the 1st Respondent's advice to the 6th Respondent to the effect that the tenor of the Supreme Court's Advisory Opinion was that the National Assembly had to approve release of the 50% revenue allocation from the Consolidated Fund was the correct interpretation of the Supreme Court Advisory Opinion.
32. To buttress the foregoing, the 1st Respondent referred to paragraph 81 of the decision where the Apex Court Judges observed as follows:



81. ... the National Assembly shall for the purpose of meeting the expenditure necessary to carry on the services of the county government during that year until such time as the division of the revenue act is assented to, authorize the withdrawal of money from the consolidated fund.
33. The 1st Respondent submitted that based on the foregoing and the provisions of Article 206(2) of the Constitution, the Petitioners' assertion that the Controller of Budget could authorize withdrawal of public funds from the Consolidated Fund without the input of the National Assembly was erroneous.
34. In conclusion, the 1st Respondent stated that the Petition was without merit and should be dismissed with costs.

The 2nd and 3rd Respondents' case:

35. The Speaker of the Senate and The Senate challenged the Petition through the Replying Affidavit of Jeremiah Nyegenye, the Clerk to the Senate, deposed to on 9th November 2020.
36. It was their case that on 29th September 2020, the Senate passed the County Allocation of Revenue Bill 2020 and referred it to the National Assembly where it was debated on and referred back to the Senate.
37. He deposed that, subsequently, the President assented to the County Allocation of Revenue Act of 8th October 2020. Its commencement date was 1st July 2020.
38. Mr. Nyegenye deposed that the Senate was negotiating on a revenue sharing formula acceptable to the members of the Senate and therefore, the Senate could not be said to have failed in discharging its mandate.
39. In reference to the decision in Council of Governors & 47 Others -vs- Attorney General & 3 Others (Interested Parties) Katiba Institute & 2 Others (Amicus Curiae) (2020) eKLR, Mr. Nyegenye deposed that the Petitioners were abusing the Court process since the Supreme Court had already settled the question that in the event of an impasse in Parliament, there were structural measures that ensure that County Governments continue to receive resources and provide services.
40. The 2nd and 3rd Respondents stated that since Parliament had passed County Allocation of Revenue Bill 2020, the Petition had been overtaken by events and was moot.
41. In the end, he urged the Court to dismiss the Petition and award costs to the 2nd and 3rd Respondents.
42. The 2nd and 3rd Respondents did not file written submissions.

The 4th Respondent's case:

43. The Controller of Budget opposed the Petition through the Replying Affidavit of Dr. Margaret Nyakang'o deposed to on 9th February 2021.
44. In reference to its role as set out in Article 228 of the Constitution, Dr. Nyakang'o deposed that in discharging its mandate, the 4th Respondent was guided among other factors, by the principles of Public Finance as provided for in Article 201 of the Constitution.
45. It was its case that that, with regard to overseeing budget implementation, the 4th Respondent authorizes withdrawals from the Consolidated Fund, Equalization Fund and the County Revenue Funds and superintends compliance by the National Government and County Government with budgetary implementation procedures and principles as set out in the Constitution.



46. It was its case that, a close reading of Article 228(5) of the Constitution as appreciated alongside the provisions of section 17(1) and (4) of the Public Finance Management Act, for the 4th Respondent to exercise the mandate to authorize any withdrawal of funds from the Consolidated Fund, the process must have first been triggered by a requisition from the National Treasury.
47. It, therefore, was its deposition that Regulation 134 of the Public Finance Management (National Government) regulations that allows the office to authorize up to 50% from the Consolidated Fund did not operate in a vacuum.
48. It was also its case that the role of the Controller of Budget comes at the tail end to provide oversight and ensure compliance with the law.
49. Based on the foregoing, the 4th Respondent stated that the Petition was misplaced, frivolous, bad in law and ought to be dismissed with costs.

The Submissions:

50. In its written submissions dated 22nd November 2021, the 4th Respondent spoke to the contentious issue of Regulation 134 of the Public Finance (national Government) Regulations.
51. It submitted that the discretion accorded to the 4th Respondent under Article 228(5) of the Constitution as read with Regulation 134 of PFM (National Government) Regulations mandated it to measure the request for withdrawal of funds against all provisions of the law including interrogating the context and circumstance of non-approval by the County Allocation of Revenue Bill by Parliament.
52. It was further its submission that according to Regulation 134(3)(1) of the PFM (National Government) as read with Article 228(5) of the Constitution, the 4th Respondent needs the concurrence of Parliament to withdraw funds under the preceding year's County Allocation of Revenue Act since, according to Regulation 134(3) it is the responsibility of Parliament to ensure that money already issued to counties is factored in before passage of County Allocation of Revenue Act.
53. It was its case, therefore, that Parliament is obligated to issue a communication confirming that the County Allocation of Revenue Bill had been approved or was likely to be approved before the mandate of the 4th Respondent is triggered and discretion exercised.
54. Separately, the 4th Respondent reiterated that the National Treasury did not submit any request for withdrawal of funds thus depriving it of the discretion under Regulation 134(1) of the PFM (National Government) Regulations.
55. In conclusion, the 4th Respondent submitted that the Petitioners failed to show the manner in which it failed to consider any request for withdrawals of funds under Regulation 134(1) of PFM (National Regulations) submitted by the National Treasury.
56. The 4th Respondent prayed that the Petition be dismissed with costs.

Analysis:

57. As captured above, the instant Petition was instituted at a time when there was an impasse in the passing of the Division of Revenue Bill in Parliament.
58. Having considered the matter in light of the Supreme Court decision in Advisory Opinion Reference No. 3 of 2019 reported as Council of Governors & 47 Others -vs- Attorney General & 3 Others (Interested Parties) Katiba Institute & 2 Others (Amicus Curiae) (2020) eKLR, this Court hereby agrees with the



2nd and 3rd Respondents that the Petition is an abuse of the Court process since the issues therein were extensively dealt with by the Supreme Court.

59. It, however, appears that the Petitioners were aggrieved by the legal opinion by the 1st Respondent on the decision in *Council of Governors & 47 Others -vs- Attorney General & 3 Others (Interested Parties) Katiba Institute & 2 Others (Amicus Curiae* case (*supra*) in urging the 5th and 6th Respondents not to release any funds under the scheme as proposed by the Supreme Court without the approval of Parliament. The opinion was dated 19th August 2020.

60. The Supreme Court addressed all perceivable instances of any impasse in Parliament on the Division of Revenue Bill. For instance, in paragraph 80, the Court had the following to say: -

[80] It is therefore our considered opinion that should an impasse occur due to the failure of the mediation process, occasioned by the lack of concurrence between the two Houses over the Division of Revenue Bill, the National Assembly shall, for the purpose of meeting the expenditure necessary to carry on the services of the County Government during that year until such time as the Division of Revenue Act is assented to, authorize the withdrawal of money from the Consolidated Fund. The monies so withdrawn shall be included, under separate vote(s) for the several services in respect of which they were withdrawn. It is to be expected that each County Assembly, would have to re-adjust their respective budgets and appropriation bills accordingly.

61. The Court then went further and addressed another scenario, as under: -

[81] This leaves us with the question regarding the percentage to be withdrawn from the Consolidated Fund. While the withdrawal of money for the purpose of the National Government under Article 222 is based on a percentage of the estimates of expenditure for that year, the same method cannot apply to the County Government, since the estimates do not include the equitable revenue share due to Counties. Logic would require that the percentage of the money to be withdrawn be based on the Division of Revenue Bill; yet this would be legally untenable, given the fact that the Bill, is not only the subject matter of controversy, but is also yet to pass into law. In the circumstances, it is our view that in the event of an impasse, the percentage of the money to be withdrawn be based on the equitable allocation to Counties in the Division of Revenue Act of the preceding financial year. In keeping with the spirit of Article 222(2)(b) of the *Constitution*, the money to be withdrawn shall be 50% of the total equitable share allocated to the Counties in the Division of Revenue Act.

[82] Assuming for purposes of argument, that 50% of the total equitable share allocated to Counties in the preceding year exceeds the total equitable share proposed in the Division of Revenue Bill, then the percentage to be withdrawn from the Consolidated Fund shall not be less than 15% of all revenue collected by the National Government. The 15% recommended in case of such an eventuality is derived from Article 203 (2) of the *Constitution*.....

[83] It is our perception that this way forward, safeguards the functionality of County Governments, while affording Parliament an opportunity to resolve the impasse through a second mediation under Article 113 of the *Constitution*. It preserves the authority of the *Constitution* by protecting its principles and values. Finally, it promotes the doctrine of separation of powers by locating the solution to a potential impasse squarely within the arena of Parliament. Our opinion in this regard, is inspired by a contextual reading of the provisions of the *Constitution* as a living Charter.



62. The Supreme Court also dealt with the worst-case-scenario where Parliament fails to authorize the release of funds from the Consolidated Fund based on the above formula. The Court had the following to say: -

[88] Given the exigencies of national life, it should not be expected that Parliament will always enact legislation in time. The 2010 *Constitution* has transformed law making from a technical exercise to a democratic and participatory process. It is therefore possible that some pieces of proposed legislation may straddle between two terms of Parliament before being passed into law. NOT SO with legislation for the implementation of the national budget and allocation of revenue to both National and County Government. In this category are to be found, the Division of Revenue Act, the County Allocation of Revenue Act, and the Appropriation Act, among others. The *Constitution* sets specific and rigid timelines within which these pieces of legislation must be enacted, since they operationalize the financial existence of the country. Without a budget and consequent financial appropriation, there would be no Executive, Legislature, Judiciary, or County Government. Budget processing and the enactment of consequential legislation are some of the most solemn responsibilities vested upon Parliament in any given financial year. Failure by Parliament to discharge such a critical legislative function, in the absence of an emergency, or any other disaster that disrupts parliamentary business, not only violates the *Constitution*, but also exposes the country to existential danger. Such a Parliament must be considered to have run its course, hence its dissolution.

63. It, therefore, comes to the fore that the 1st Respondent only reiterated what the Supreme Court had stated in its decision. The legal opinion by the 1st Respondent to the 5th and 6th Respondents was, hence, in line with the decision in Council of Governors & 47 Others -vs- Attorney General & 3 Others (Interested Parties) Katiba Institute & 2 Others (Amicus Curiae case (supra)).

64. In bringing the instant Petition, the Petitioners effectively wanted to by-pass the decision in *Council of Governors & 47 Others -vs- Attorney General & 3 Others (Interested Parties) Katiba Institute & 2 Others (Amicus Curiae case (supra))* where the Court stated that if Parliament failed to deal with the impasse then the last resort was its dissolution.

65. If the Petitioners were convinced that Parliament had failed in its mandate to the Counties under the *Constitution*, then the recourse was to seek for its dissolution, but not to institute proceedings with a view to mischievously circumvent a settled decision of the Supreme Court of Kenya. To that end, although the Petition was largely a public-interest litigation, the Petitioners must be condemned to shoulder the costs of the case.

66. Having said as much, the Petition is unsustainable and is for rejection.

Disposition:

67. Deriving from the foregoing, the following final orders do hereby issue: -

- i. The Petition dated 11th September, 2020 be and is hereby dismissed.
- ii. The Petitioners shall jointly and severally bear the costs of the Petition.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT KITALE THIS 15TH DAY OF DECEMBER, 2023.

A. C. MRIMA

JUDGE



Judgment virtually delivered in the presence of:

N/A for the Petitioners.

N/A for the 1st, 5th and 6th Respondents.

Miss. Thanji, Learned Counsel for the 2nd and 3rd Respondents.

Chemosop/Duke – Court Assistants.

